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In the
Supreme Court of the United States

OCTOBER TERM, 1966

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA,
et al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

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Petitioners, the Peoria Tribe of Indians of Oklahoma, et al., pray that a writ of certiorari issue to the United States Court of Claims to review the judgment of that Court entered in this case on December 16, 1966, rehearing denied March 17, 1967.

OPINION BELOW

The opinion of the Court of Claims, December 16, 1966, rendered by three of the Court's five judges, together with the dissenting opinion of the other two, is reprinted as Appendix A. The decision is as yet unreported in the official reports.

JURISDICTION

The judgment of the Court of Claims was entered on December 16, 1966; rehearing was denied on March 17, 1967. Jurisdiction is invoked under Section 20 of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70s(c) and 28 U.S.C. § 1255.

TREATY INVOLVED

The treaty of May 30, 1854, 10 Stat. 1082, between petitioners and the United States is reprinted as Appendix B to this petition.

QUESTION PRESENTED

Under a treaty which provides that the President may pay to an Indian tribe or invest for its benefit the proceeds of its lands to be sold by the Government as trustee, is the Government liable (as a private trustee would be) for failure to invest proceeds not realized by reason of a deliberate breach of its trust by the Government?

STATEMENT OF THE CASE

On May 30, 1854, the effective date of the Kansas-Nebraska Act, 10 Stat. 277, which opened Kansas to white settlement, a treaty was concluded (10 Stat. 1082, Appendix B) whereby the petitioners ceded part of their Kansas reservation in trust to the United States, which undertook to offer the lands for sale at public auction, and to pay the proceeds, less expenses, to the Indians, subject to the following provision (Article 7):

... And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, deter-

mine how much of the net proceeds of said sales shall be paid to them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

Following the Kansas-Nebraska Act, and the Act of July 22, 1854, 10 Stat. 308, which opened ceded Indian lands in Kansas to pre-emption (i.e., the statutory right of the first settler to acquire 160 acres of the public lands at a fixed price), "settlers, investors and speculators" squatted on the petitioners' land and claimed rights of preemption thereto. (15 Ind. Cl. Comm. 123, 143-4) In response to a request of the Secretary of the Interior for a legal opinion, the Attorney General stated that the allowance of pre-emption rights "would be a violation of the treaties", a breach of trust, a fraud upon the Indians." (Pet. Ex. 166, J 1, p. 26, 15 Ind. Cl. Comm. 123, at 144.)

Nevertheless, under express instructions from the Commissioner of Indian Affairs, the squatters were permitted to buy petitioners' lands at fixed, "appraised" prices, without any auction. The consequence was, as determined by the Indian Claims Commission, that the sum realized from the sales was \$172,726.04 less than it should have been, and the Commission awarded judgment to petitioners in that amount.

Petitioners also claimed an additional return, measured by interest, by reason of the Government's obligation to invest so much of the proceeds as was not paid to the Indians. This claim was denied. On petitioners' appeal, the Court of Claims, by a divided court, affirmed.

* There were three such treaties. For the other two, see 10 Stat. 1048; 10 Stat. 1069.*

REASONS FOR GRANTING THE WRIT

1. The Question is Important

The decision of the Indian Claims Commission, from which the United States did not appeal, holds the United States liable for the non-performance of its obligation to sell the petitioners' land at public auction, but, as affirmed by the Court of Claims, relieves the United States of liability for the non-performance of any obligation to invest the proceeds.

The majority of the Court of Claims regards the provision for investment as discretionary, not mandatory, and therefore not actually an obligation. The minority regards the obligation to invest as a mandatory alternative to non-payment to the Indians. The majority applies the rule of strict construction of the liability of the sovereign. The minority applies the rule that an Indian treaty is to be construed as the tribe would have understood it.

The question is important because the standards by which the United States is to be held to account as an express (and generally self-appointed) trustee of tribal property are important.

It is hardly to be doubted that a similar provision in a trust agreement with a private individual or corporation would require the trustee to invest trust funds acquired by him, and to be responsible for a failure to invest as well as for a failure conduct the sales properly. In this case, the United States has been held to a lower standard of performance, to the damage of an Indian tribe over which the United States, by its own sovereign will, has asserted the power of guardianship. In this case, the sovereign's statutory exemption from interest on claims against it has been in effect extended

to exemption from damages (at least in part) for breach of trust.

2. The Decision is in Conflict With the Applicable Decisions of This Court

The majority's decision violates two cardinal principles: (1) that discretion vested in a public officer for the benefit of others requires him to act (*Mason v. Fearson*, 9 How. 248, 259; *Supervisors v. United States*, 4 Wall. 435, 446-447), and (2) that an Indian treaty must be construed in the sense in which it would naturally be understood by the Indians (*Jones v. Meehan*, 175 U.S. 1, 11; *United States v. Shoshone Tribe*, 304 U.S. 111, 116; *Tulee v. Washington*, 315 U.S. 681, 684-685; *The Kansas Indians*, 5 Wall. 737, 760; *Choctaw Nation v. United States*, 119 U.S. 1, 27-28; *Minnesota v. Hitchcock*, 185 U.S. 373, 396; *United States v. Winans*, 198 U.S. 371, 380-381).

In *Mason v. Fearson*, 9 How. 248, 259, this Court upheld as a well-established doctrine

that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been to "impose a positive and absolute duty".

That a similar doctrine is applicable to a treaty, which, when it is self-operating, is equivalent to an act of the legislature (*United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 196) is also required by the second of the two principles adverted to. As stated by Judge Davis in his dissenting opinion:

The Treaty's use of "may", rather than "shall", should not be given the weight the court puts on it

to show the unlimited character of the President's discretion. This was not a carefully-drawn business contract between equals or even a Congressional enactment, but an Indian treaty. "[F]riendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed." *United States v. Shoshone Tribe*, *supra*, 304 U.S. at 116. "The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, *supra*, 175 U.S. at 11. To the Peoria Tribe, Article 7 would have meant the same if it had said that the President "shall," instead "may", determine the way the funds were to be allocated. Their understanding, as I judge it, was that the monies turned over to them would be enough to satisfy their current wants, and the rest was to be invested for profit, with the increment accruing to their benefit. That was "the substance of the right without regard to technical rules." *United States v. Winans*, *supra*, 198 U.S. at 381.

Judge Davis points out that it is settled that "the mere fact that the United States did not pay the additional \$172,000 in the 1850's, as it should have, would not, in itself, bar the Tribe from now collecting interest to which it would otherwise be entitled. See *United States v. Blackfeather*, 155 U.S. 180, 192 (1894); *Mille Lac Band of Chippewa v. United States*, 51 Ct. Cl. 400, 407-08 (1916); *Pawnee Tribe v. United States*, 56 Ct. Cl. 1, 15 (1920); *Menominee Tribe v. United States*, 107 Ct. Cl. 23, 33, 67 F. Supp. 972, 975 (1946); *Nez Perce Tribe v. United States*, Ct. Cl., (July 15, 1966)."

CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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